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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 721

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, Etc.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COLLECTOR

OPINIONS BELOW

The case has not been decided by the Circuit Court of Appeals. The opinion of the District Court (R. 17) is reported in 39 F. (2d) 395.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on February 9, 1931. (R. 29.) On April 11, 1931, the parties filed a joint

motion for a writ of certiorari to bring up the entire record and cause. This motion was granted on April 20, 1931.

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Instead of copying the questions certified, we present them (as we conceive they are raised upon the whole record) as follows:

Whether, in computing the Federal estate tax of a decedent who died in 1925 (which tax was consequently governed by Section 302 of the Revenue Act of 1924), the Commissioner was justified in including in the gross estate the entire value of certain items of property held by the decedent and his wife as tenants by the entirety at the time of his death, in the absence of any showing that any part of the property originally belonged to the survivor. The items included—

(1) Some property which was acquired by the husband and wife after the passage of the Revenue Act of 1924;

(2) Some property which was acquired by them before the passage of that Act but after the passage of the Revenue Act of 1916 (which was the first Act to impose a Federal estate tax); and

(3) A savings account and a checking account, in regard to which the findings show merely the amounts on deposit at the time of the death of the

decedent and the fact that the accounts were opened in 1910.

STATUTES INVOLVED

The statute involved is Section 302 of the Revenue Act of 1924, pp. 28–29, *infra*. The appendix (pp. 26–34, *infra*) prints or refers to similar provisions in all of the other Revenue Acts and also a Congressional Committee Report and regulations.

STATEMENT

There is no dispute as to the facts in this case, a jury trial having been waived in writing and the trial court having found the facts to be as stipulated by the parties. (R. 13, 18.)

The action was brought in the District Court of the United States for the Middle District of Pennsylvania by the Executor of the will of William B. Lewis, deceased, who died in 1925, domiciled in Pennsylvania, against the local Collector of Internal Revenue of the United States to recover $18,915.12 (with interest thereon from September 16, 1926), which the plaintiff asserts was the amount collected in excess of the correct amount of the Federal estate tax against the estate. (R. 2.) The only controversy is in connection with thirteen items of property, all of which the executor asserted were held by the decedent and his wife as tenants by the entirety at the time of his death. (R. 8.) The District Court held that all of these items were held in tenancies by the entirety

(R. 23) and the Government does not challenge this holding. These items include interests in real estate in Pennsylvania and in Florida, shares of the capital stock of a New Jersey corporation, mortgage bonds of a corporation located in Shamokin, Pennsylvania (as to which the State of incorporation does not appear), bonds and notes secured by mortgages of real estate (some of which was in Pennsylvania and some of which was in Florida), unsecured promissory notes, household furniture, and a savings account and a checking account in a bank in Pennsylvania. These items of property are described in detail in Paragraph Ninth of the statement of the plaintiff's claim filed in the District Court, which paragraph was incorporated by reference in the stipulation of facts (R. 3–7, 18.) For present purposes the items may be identified and grouped as follows (the numbers given being the numbers of the subparagraphs in Paragraph Ninth of the plaintiff's statement of claim in the District Court):

Group A.—Property held in joint tenancies created after the passage of the Revenue Act of June 2, 1924

(5) Bonds of a water company located in Shamokin, Pennsylvania, acquired September 6, 1924. The stipulation recites: "They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust & Safe Deposit Com-

pany." (R. 19.) No statement is made as to when the funds were deposited. It seems probable, however, that they came from one of the accounts which was opened in 1910.

(6) A bond secured by mortgage of real estate in Pennsylvania, transferred to the decedent and his wife on May 1, 1925.

(10) Unsecured promissory note, dated May 4, 1925. It appears that the note was given for a loan made from funds accumulated in the savings bank which were accumulated prior to June 2, 1924. (R. 19.)

Group B.—Property held in tenancies by the entirety created between the date of passage of the Revenue Act of September 8, 1916, and the date of passage of the Revenue Act of June 2, 1924

(1) A tract of land in Pennsylvania, deeded to the decedent and wife on August 12, 1922.

(2) A tract of land in Pennsylvania, deeded to the decedent and wife on November 5, 1919.

(3) A tract of land in Florida, deeded to the decedent and wife on December 26, 1923.

(4) Four thousand shares of the capital stock in a New Jersey corporation, the original certificates for which were issued to the decedent and wife on September 10, 1921.

(7) Note, secured by mortgage of real estate in Pennsylvania, dated February 16, 1923.

(8) Note, secured by mortgage of real estate in Florida, dated January 11, 1924.

(9) Note, secured by mortgage of real estate in Florida, dated April 25, 1924.

(18) Household furniture, valued at $2,075. All that appears in regard to this is that it "was purchased with funds of William B. Lewis and Anna Laura Lewis, about 1920, from the savings account in Dime Trust & Safe Deposit Company." (R. 19.)

Group C.—Bank accounts which were opened in 1910

(11) All that appears in regard to this item is the following:

> Saving Account No. 3322 in Dime Trust & Safe Deposit Company standing in the name of William B. Lewis or Anna L. Lewis. On September 25, 1925, the date of William B. Lewis's death, there was a balance of forty-seven thousand nine hundred sixty-two dollars and eighty cents ($47,962.80) and the accrued interest thereon was eight hundred twelve dollars and thirty-three cents ($812.33). (R. 6–7.)
>
> * * * * *
>
> Item No. 11, consisting of saving account No. 3322 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis, at the time of Mr. Lewis's death, showed a balance of $47,962.80, and the accrued interest thereon was $812.33. This savings account was opened in 1910 in the names of William B. Lewis or Anna Laura Lewis. (R. 19.)

(12) This is a checking account in the same bank. All that appears is that the account was opened in 1910 and that the balance at the time of the decedent's death was $1,566.66. (R. 7, 19.)

It does not appear what amount was put in either of these accounts when it was opened or what withdrawals from it or deposits to it there had been since that time.

The only other findings which can possibly be material in regard to the issues presented here are that at all times in question the decedent was married to Anna Laura Lewis, who survived him, and that the title to each item of property mentioned, excepting the furniture, "stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death." (R. 19.)

The entire value of the property held in tenancies by the entirety was evidently included in the gross estate. (See Paragraph V of Affidavit of Defense, R. 13.)

The District Court decided the case in 1929, before the decision of this Court in *Tyler* v. *United States*, 281 U. S. 497.

The holdings of the District Court appear in the following extracts from the opinion (R. 23-24):

> Since under the law of Pennsylvania an estate by entireties is a unit and indivisible and upon the death of one of the tenants the interest or estate of the deceased tenant

cease and there is no transfer of any estate, or any part thereof, to the survivor, the survivor has the entire estate and takes no new estate. The value of such estate may not be included in the gross estate of the decedent and hence there is nothing upon which to impose an estate tax under the revenue act of 1924.

* * * * *

The conclusion of the court is that the property in question was vested in the decedent and his wife as tenants by entireties; that there was no transfer of any interest or estate to the wife upon the death of the decedent, and consequently there was nothing to which a Federal estate tax could apply.

* * * It, therefore, follows that the tax in question was illegally collected and must be returned to the plaintiff, with interest.

And now, February 2, 1929, it is ordered that the plaintiff, the Dime Trust & Safe Deposit Company, have judgment against the defendant, David W. Phillips, collector of internal revenue, 12th district, for the sum of $18,915.12 with interest at six per centum per annum, from September 10th, 1926.

The Government assigned the holdings quoted as error. (R. 25–26.)

The court also said (R. 23–24):

If it be held that the revenue act cited is intended to apply to estates by entireties in Pennsylvania, the court would be compelled

to hold that so much of the revenue act as applies to the taxation of estate by entireties in Pennsylvania is in violation of section 2, clause 3, and section 9, clause 5, of Article I of the Federal Constitution and the 5th amendment to the Constitution. *Tyler* v. *United States of America, supra.*

Judgment was entered for the plaintiff for the full amount claimed (R. 25) and the Government appealed. Before deciding the appeal the Circuit Court of Appeals certified certain questions to this Court. (R. 29-30.)

SPECIFICATION OF ERRORS

The Government specifies as errors all of the holdings of the District Court which appear in the language from the opinion of that court quoted on pages 7 to 9 above. In other words, the Government assigns as errors the holdings of the District Court that the value of each of the thirteen items of property listed above should not have been included in the gross estate of the decedent for purposes of computing Federal estate taxes on his estate.

SUMMARY OF ARGUMENT

The Government contends that the Commissioner, in computing the Federal estate tax, properly included in the gross estate of the decedent all of the items in question, and that the questions as relating to all of the items is governed by the reasoning, although not by the actual decisions, in

Tyler v. *United States*, 281 U. S. 497, and the cases decided with it.

Inasmuch as the certificate of the Circuit Court of Appeals indicates that the court believed that the items fell into three different periods as to which different rules might apply, we discuss those three different periods separately.

The question as to the property which was acquired after the passage of the Revenue Act of 1924 (which was applicable, as the decedent died in September, 1925) is the same as that which was decided in the *Tyler case*. The only possible difference between that case and this part of the instant case is that in the *Tyler case* it affirmatively appeared that the property in question belonged to the decedent as the sole owner up to the time when the tenancy by the entirety was created. Here the Government relies upon the absence of any proof that any part of the items in question originated in property belonging to the wife and the provision of the statute that the value of the property shall be taxed "except such part thereof as may be shown to have originally belonged to such other person." The regulation promulgated under this provision, to the effect that "the entire value of such property is *prima facie* a part of the decedent's gross estate," is obviously a proper interpretation of the statute. On the record in the instant case the determination of the Commissioner can not be disputed.

The value of the property acquired before the passage of the Revenue Act of 1924, but after the passage of the Revenue Act of 1916, was properly included in the gross estate. Section 302 (h) of the Revenue Act of 1924 provides that the subdivision in regard to property held by tenants by the entirety shall apply to such estates whether created "before or after the enactment of this Act." Any question as to the constitutionality of this provision as applied to property acquired after the passage of the Revenue Act of 1916 is set at rest by the decision of this Court in *Milliken* v. *United States*, No. 87, October Term, 1930, which was rendered after the Circuit Court of Appeals certified the questions in the instant case.

The entire amount of the balances in the bank accounts at the time of the decedent's death was properly included in the gross estate. The mere fact that these accounts were created in 1910 does not justify the assumption that the balances existing at the time of the decedent's death represented money deposited in the accounts prior to 1916, as there is no finding as to the amount of the balances at the date of the passage of the Act of 1916 and the record contains no information as to withdrawals or deposits either before or since that date. But even if these balances could be treated as representing deposits made prior to 1916, they should be included in the gross estate. The provision of the Act of 1924 quoted above obviously is intended to include jointly held property, even if acquired

prior to the passage of the Act of 1916. The reasoning of this Court in the *Tyler case* shows that such a provision is not open to the objection that it violates the constitutional provisions as to direct taxes or as to due process of law.

ARGUMENT

The Government contends that the Commissioner properly included in the gross estate all of the items of property in question, and that it is immaterial when any tenancy by the entirety was created. But as the certified questions show that the Circuit Court of Appeals felt that certain distinctions might be made, we discuss separately the three different periods indicated by the certificate.

I

THE VALUE OF THE PROPERTY ACQUIRED AFTER THE PASSAGE OF THE REVENUE ACT OF 1924 WAS PROPERLY INCLUDED IN THE GROSS ESTATE

Under this heading come the items which we have put in Group A in our statement (pp. 4–5, *supra*).

The question as to these items is obviously answered by *Tyler* v. *United States*, 281 U. S. 497, and the two other cases decided in the same opinion. Those other cases involved tenancies by the entirety in Pennsylvania real estate. The only possible distinction between the situation presented in those cases and that presented in regard to these items is that in those cases it affirmatively appeared that the property taxed belonged to the decedent as the sole

owner up to the time when the tenancy by the entirety was created. In one of them, the *Girard Trust Company case*, it did not appear positively that the surviving spouse furnished no part of the consideration for the purchase of the property, although, perhaps, this was a fair inference from the facts recited in the finding. Even if there is a difference in the precise situation covered by the cases, we submit that it is immaterial. Section 302 of the Revenue Act of 1924 (p. 28, *infra*) provides that the—

> value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth [with certain provisos].

The regulations promulgated under this section in regard to property held by tenants by the entirety provide: "The entire value of such property is

prima facie a part of the decedent's gross estate." (Art. 23, Regulations 68, pp. 31-33, *infra*.) This is obviously a proper interpretation of the statute. As the record in the instant case does not show that any part of the items in question originated in property belonging to the wife of the decedent, the determination of the Commissioner can not be reversed, as "the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection." *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361; *Reinecke* v. *Spalding*, 280 U. S. 227, 232.

Perhaps special mention should be made of Item 10, a note dated May 4, 1925. Although this was acquired by the decedent and his wife after the passage of the Act of 1924, it represented a loan of funds which belonged to them as tenants by the entirety prior to the enactment of that Act. But the item can not be treated as if the tenancy by the entirety in the property was created before the passage of the Act because of that fact. In the *Provident Trust Company case*, which was decided with *Tyler* v. *United States*, it appeared that one of the items in question was acquired after the passage of the applicable Act with property which was held in a tenancy by the entirety prior to the passage of the Act. This fact was called to the attention of the Court in the Government's brief (No. 546, October Term, 1929), but this Court said (p. 500):

In each case the estate was created after the passage of the applicable Act.

II

THE VALUE OF THE PROPERTY ACQUIRED PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1924 BUT AFTER THE PASSAGE OF THE REVENUE ACT OF 1916 WAS PROPERLY INCLUDED IN THE GROSS ESTATE

Section 302 of the Revenue Act of 1924 provides in subdivision (e) for the inclusion of the interest in all property held as tenants by the entirety by the decedent and spouse. Subdivision (h) of this section provides:

> Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

The Act consequently is intended to apply to property held in tenancies by the entirety created prior to the passage of the Act.

The only possible question as to such property is whether the Act is unconstitutional. After the Circuit Court of Appeals certified questions in the instant case, this Court handed down its opinion in *Milliken* v. *United States*, No. 87, October Term, 1930. That case involved the provision in Section 402 of the Revenue Act of

1918 that property of which the decedent had made a transfer in contemplation of death should be included in the gross estate. The Court held that the provision was free from constitutional objections as applied to such a transfer made prior to the passage of the Act of 1918, but after the passage of the Act of 1916, which had contained similar provisions for the taxing of decedent's estates, including gifts in contemplation of death, but at lower rates, and which was repealed by the 1918 Act. Upon the reasoning in that case, it is clear that there can be no constitutional objection to the provision requiring the inclusion of property held by the decedent and his wife as tenants by the entirety as applied to property in which the tenancy was created after the passage of the Act of 1916, which provided that property held by the decedent and spouse as "tenants in the entirety" should be included in the gross estate in computing the Federal estate tax. (Section 202 (e), p. 26, *infra*.) Such a provision has been in effect at all times since the passage of the Act of 1916. See Section 402 (d) of the Revenue Acts of 1918 and 1921, pp. 26–27, *infra*.

See also *Klein* v. *United States*, No. 387, October Term, 1930, decided April 13, 1931.

There consequently can be no doubt as to the propriety of the action of the Commissioner in including the items which we have listed in Group B, pp. 5–6, *supra*.

III

THE ENTIRE AMOUNT OF THE BALANCES IN THE BANK ACCOUNTS AT THE TIME OF THE DECEDENT'S DEATH WAS PROPERLY INCLUDED IN THE GROSS ESTATE

There remain to be considered only two items, a checking account and a savings account in a bank. The District Court evidently concluded that tenancies by the entirety existed as to these accounts. Whether this is correct or not seems unimportant, in view of the fact that the applicable statute treats tenancies by the entirety and deposits in banks in "joint names and payable to either" in exactly the same manner. (Section 302 (e) of the Revenue Act of 1924, p. 28, *infra*.)

Apparently the Circuit Court of Appeals regarded the balances in these accounts as having been on deposit since some date prior to the passage of the Revenue Act of 1916, as there are no other items which can be effected by the first question certified (R. 30):

> Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

We contend that upon the state of the record, the Court is not justified in assuming that any part of the balances in question was held by the decedent and his wife as tenants by the entirety prior

to the passage of the Revenue Act of 1916. All that the findings show is that each of the accounts was opened in 1910 in their joint names. (R. 19.) There is no showing whatever as to the amount originally deposited or the balance on hand at the date of passage of the Revenue Act of 1916. There is not even a statement as to whether any deposits other than the original deposits were made or as to the amount of withdrawals, although it does appear that the household furniture was purchased in 1920 with funds from the savings account. (R. 19.) We submit that the plaintiff is in no position to make any contention whatever as to either of the bank accounts, as it is entirely possible that the entire balance on hand at the time of the decedent's death represented deposits made in the account subsequent to the passage of the Revenue Act of 1924 or subsequent to the passage of the Revenue Act of 1916.

Even if it could be assumed that a tenancy by the entirety in some of the property in question was created prior to the passage of the Act of 1916, we maintain that it was properly included in the gross estate. On this assumption the sole question is whether the clearly expressed intention of Congress violates the "due process" clause of the Fifth Amendment.

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court enunciated the rule that Congress may not consti-

tutionally enact an estate tax on property which was finally transferred before the enactment of the taxing statute. Similar principles were later applied in *Untermeyer* v. *Anderson*, 276 U. S. 440, and more recently in *Coolidge* v. *Long*, Nos. 33 and 34, decided February 24, 1931, in both of which this Court held that taxing statutes violated a "due process" clause of the Constitution.

But in the present case the event which is taxed is the "shifting of the economic benefits of property," which takes place on the decedent's death, after the enactment of the taxing statute. In *Tyler* v. *United States*, 281 U. S. 497, *supra*, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. In that case the tenancy was created after the passage of the applicable taxing statute, so that the actual decision is not necessarily controlling here. But we submit that the grounds on which the decision in the *Tyler case* is based make it clear that the application of the taxing statute to a tenancy by the entirety created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution.

In its opinion in the *Tyler case*, this Court stated that the death of a tenant by the entirety was the "generating source" resulting in "the bringing into being or the enlargement of property rights," and that if Congress chose to place a tax upon such

a result, there was nothing in the Constitution which prevented. This Court then said (p. 503):

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.
>
> * * * * *
>
> Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler case*, No. 428) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased

> to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. And in that view the resulting tax attributable to such property is plainly indirect.

These extracts from the opinion in the *Tyler case* make it clear that death, the event which is the occasion for the imposition of the tax, is the generating source of the enlargement of property rights in the survivor. This is an event which takes place after the passage of the taxing statute, regardless of when the tenancy was created. In the present case, the decedent's death was the event which made the shifting of the full benefits of ownership to his wife complete and effective, and secured to her the sole possession and enjoyment of the property unburdened by her husband's rights. Until his death, the decedent re-

tained a dominion over the property equal in all respects to that of his wife, and, if she had predeceased him, he would have had the entire interest in the property. Under the decision in the *Tyler case*, this ripening of property rights is a proper subject for the imposition of a tax.

In *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, this Court upheld the inclusion in the gross estate of the value of property which the decedent had transferred on revocable trusts in 1903 and 1910, prior to the enactment of any estate tax law. In distinguishing the case of *Nichols* v. *Coolidge*, 274 U. S. 531, this Court said (p. 345):

> As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of *Nichols* v. *Coolidge*, 274 U. S. 531. In that case it was held that the provisions of the similar section 402 of the 1918 Act, 40 Stat. 1097, making its applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States*, decided this day, *ante*, p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271, that a transfer made subject to a power of

> revocation in the transferor, terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute.

A similar result was reached in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, where this Court sustained the validity of a Massachusetts statute imposing a succession tax on property passing under a trust, executed before the passage of the taxing statute, where the settlor of the trust reserved a general power to change its terms or terminate it, with the concurrence of one trustee.

In *Chase National Bank* v. *United States*, 278 U. S. 327, this Court said (p. 338):

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey*, 205 U. S. 466.

See also *Klein* v. *United States*, *supra*.

It would seem to follow from these decisions that the date of the creation of the tenancy is immaterial. The ripening and completion of the economic benefits to the survivor does not occur until the death of the decedent. Upon the happening of that event the tax is imposed, and no question of retroactivity is involved.

The Regulations of the Treasury Department have not been uniform as to the question now under consideration. At first the Department applied the statute to all tenancies whenever created. Regulations 68, issued under the Revenue Act of 1924, merely copied Section 302 (h) of that Act (p. 29, *infra*). In 1928, Treasury Decision 4248 was promulgated, providing that the taxing statute did not apply to tenancies created before September 8, 1916. (P. 33, *infra*.) But, on July 3, 1930, after the decision of this Court in the *Tyler case*, Treasury Decision 4294 was promulgated. (P. 34, *infra*.) This decision revoked the earlier ruling and expressly provided that all tenancies by the entirety were subject to the tax regardless of the time when they were created. This regulation is still in effect.

The precise question now under consideration has been before the District Court for the District of Massachusetts and the Board of Tax Appeals, and both decided that property held by a decedent as a tenant by the entirety was subject to the estate tax, although the tenancy was created before September 8, 1916. *Third National Bank & Trust Co.* v. *White*, 45 F. (2d) 911; *Slocum* v. *Commissioner*, 21 B. T. A. 169; *Commerce Union Trust Co.* v. *Commissioner*, 21 B. T. A. 174; *Putnam* v. *Commissioner*, 21 B. T. A. 205; *Garrison* v. *Commissioner*, 21 B. T. A. 904; *Mercantile-Commerce National Bank* v. *Commissioner*, 21 B. T. A. 1347; *Robinson* v. *Commissioner*, 21 B. T. A. 1373.

No decisions to the contrary have been rendered since the decision of this Court in the *Tyler case*.

An argument against the validity of the statute as applied to tenancies by the entirety created before the passage of the applicable act may be found in the dissenting opinion in *Pennsylvania Co.* v. *Commissioner*, 21 B. T. A. 176, 183.

The Court of Appeals of New York in 1922 held a similar provision in a state statute invalid as applied to property held in tenancies by the entirety created prior to the passage of the statute. *Matter of Lyon*, 233 N. Y. 206.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

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APRIL, 1931.

APPENDIX

STATUTES

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777–778) in Title II (Estate Tax) provided in part:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * * *
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.
>
> * * * * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 324), increased the rates of the Estate Tax but made no other changes in this tax.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1097) in Title IV (Estate Tax) contained the same provision except that it was renumbered to be Section 402 (d).

The Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 278) in Title IV (Estate Tax) provided in part:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

* * * * * * *

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional

part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

In the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 70–71; U. S. C. App., Title 26, Sec. 1094) in Title III (Estate Tax) Section 302 (e) is the same as Section 302 (e) in the Revenue Act of 1924, set out above, except that in the two places in which it appears the phrase "a fair consideration" is replaced by the phrase "an adequate and full consideration"; and Section 302 (h) is the same in the two Acts, except that in the Revenue Act of 1926, the words "Except as otherwise specifically provided therein" are inserted at the beginning of the subsection.

No changes were made in this provision by the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791).

CONGRESSIONAL COMMITTEE REPORT

Revenue Act of 1924

In the Report of the Committee on Finance, Senate Report No. 398, 68th Cong., 1st sess., it was said (p. 35):

> Section 302 (e): The provisions of the House bill and the existing law have been reworded to secure greater clarity.

Section 302 (h): This subdivision provides that the property interests which are included in the gross estate for purposes of the estate tax are those enumerated in this section, whether such interests were created or arose or were relinquished before or after the enactment of this act.

A similar provision is included in subdivision (e) [relating to trusts] of section 402 of the existing act [Revenue Act of 1921]. It has seemed desirable to extend this provision expressly to the other property interests set forth in this section.

In the Conference Report, House Report No. 844, 68th Cong., 1st Sess., it was said (p. 25):

The provision of the House bill with reference to that part of the gross estate made up of property held by the decedent as a joint tenant or as a tenant by the entirety has been reworded for purposes of clarity. * * *

REGULATIONS

Regulations 68, promulgated under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by

gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and all interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration

so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) Where the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and

the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire value of the property should be included; (d) where the other joint owner, prior to the acquirement of the property, received from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Treasury Decision 4248, promulgated November 23, 1928, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved November 23, 1928:
A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4294, promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last sentence of article 22 of Regulations 68, added thereto by T. D. 4248, is amended to read as follows:

"The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created."

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930:
A. W. MELLON,
Secretary of the Treasury.

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